IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 12TH APRIL 2007 / 22ND CHAITHRA 1929

Crl.Rev.Pet.No. 2743 of 2004(C)

CRA.7/2003 of ADDL. SESSIONS COURT (ADHOC), KALPETTA
CC.123/1998 of CHIEF JUDICIAL MAGISTRATE COURT, KALPETTA
.....

REVN. PETITIONER/APPELLANT/ACCUSED:

PRADEEP, S/O. BALAKRISHNAN NAMBISAN,
MECHILATTUMEETHAL VEEDU, THARUVANA,
MANANTHAVADI TALUK, WAYAND DISTRICT.

BY ADV. SRI. V.N. RAMESAN NAMBISAN
SRI. M.V. AMARESAN

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:
----

1. ALEX PUNNOOSE, KALPETTA AMSOM DESOM,
VAYTHIRI TALUK.

2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT
OF KERALA AT ERNAKULAM.

BY ADV. SRI. J. DEVADANAM
SRI. VINOD J.DEV
SRI. PRAMOD J.DEV
PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

CRL. R.P. No.2743 OF 2004

Dated this the 12th day of April, 2007.

O R D E R

Revision petitioner was convicted for offence under Section 138 of the Negotiable Instruments Act (Act, for short) and sentenced to undergo simple imprisonment for nine months by Chief Judicial Magistrate. In appeal, learned Additional Sessions Judge confirmed the conviction, but reduced the sentence. Accused was sentenced to pay a fine of Rs.5,000/- and in default to undergo simple imprisonment for two months and to pay compensation of Rs.1 lakh. In default of payment of compensation he was also ordered to undergo simple imprisonment for four months under Section 357(3) of the Code of Criminal Procedure (Code, for short). The said conviction and sentence are challenged in this revision.

2. **Facts briefly**: Accused allegedly borrowed an amount of Rs.1,25,000/- from complainant-respondent on 30.12.1996 and handed over a cheque Exhibit P1, in assurance of payment of the said amount. The cheque is dated 25.02.1997. The cheque, on presentation, was dishonoured for insufficiency of fund. Lawyer notice was issued. But, the amount was not repaid by accused, though notice was received by him. After complying with the legal formalities, therefore, a complaint was filed alleging offence under Section 138 of the Act.

3. PW1 was examined and Exhibits P1 to P7 were marked to prove the prosecution case. The accused examined DWs 1 and 2 and marked Exhibit D1. In appeal, appellant examined himself also as DW3. According to accused, he did not execute Exhibit P1 cheque. He handed over Exhibit P1 in the blank form while his father DW1 availed a loan of Rs.50,000/- from Amar Investments & Finance run by complainant. To get the money from the financier, his father had to produce as security, the original documents belonging to petitioner's mother and also blank cheques of revision petitioner. Though the amounts were paid back by his father to the financier, some dispute arose relating to the interest due and hence he misused the blank cheque and filed a false complaint through the son. No amount is actually due from accused to complainant. He did not borrow any amount at all from complainant.

4. The arguments in this case commenced by opening the defence case. The material portions from the evidence of DWs 1 to 3 and Exhibit D1 were read out to emphasize that the accused has proved his case. The whole effort taken by learned defence counsel was to convince this Court that the accused has proved his case. Decisions were also cited to argue on the lesser rigor of the degree of proof which is required to establish the defence case. It was argued that the defence case need only be probabilized and the court need not

insist upon proof beyond reasonable doubt etc., in the light of the decision reported in ***Narayana Menon* vs. *State of Kerala*** **(2006 (3) KLT 404)** etc. In short, much time was consumed by learned counsel for petitioner to satisfy the court that accused established his case.

5. Both the courts below analysed the defence case meticulously to find out whether accused proved his case or not. It was not considered at all, whether prosecution established the case alleged by it. I am not surprised at this approach made in this case. This has been the line of argument advanced at the bar in almost all cases involving offence under Section 138 of the Act. In every such case, the efforts taken by both sides would primarily be, to convince the court whether accused had proved his case or not. Consequently, no attempt will be made either by complainant or accused or even the court to ascertain whether prosecution has proved its case or not. Nothing will be argued also on the prosecution case or the evidence adduced by the prosecution. The same approach was made in this case also. This is not only illegal but perverse also.

6. Section 101 of the Evidence Act relates to burden of proof and Section 102 lays down on whom burden of proof lies. Those provisions read as follows:

"**Burden of proof**: Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) *A* desires a court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that B has committed the crime.

(b) *A* desires a court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which *B* denies, to be true.

A must prove the existence of those facts".

Section 102 of Evidence Act reads as follows.

"**On whom burden of proof lies** : The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".

7. A reading of Sections 101 and 102 of Evidence Act make it abundantly clear that the burden to prove the prosecution case is on the prosecution itself. When the prosecution alleges and desires the court to give a judgment that the accused shall be punished for an offence, which the prosecution/complainant alleges that the accused has committed, the prosecution/complainant must prove that the accused committed such offence. The illustrations (a) to Section 101 of Evidence Act makes it clearer that when A desires a court to give

judgment that B shall be punished for a crime which A says B has committed, A is bound to prove the same.

8. The commission of a crime is established ordinarily by proving all the relevant facts which constitute the alleged offence. The prosecution is bound to prove all the ingredients of the offence and the court shall advert its attention to the question whether the prosecution has proved each and every ingredient of the offence, before a person is held to be guilty of the offence. The offence under Section 138 of the Act is not an exception to these fundamentals of law relating to burden of proof and in a prosecution for offence under Section 138 of the Act, the court shall see whether complainant has proved every ingredient of the offence or not. The courts shall not be carried away by the arguments advanced in the reverse direction, whether the accused has established his case or not.

9. But, both the courts below considered whether the accused proved its case or not, instead of deciding whether prosecution proved its case or not. The courts below proceeded to enter a finding that the accused failed to prove his case and hence, the prosecution case stood proved. This approach is not only illegal but is perverse also. What is fundamental, **ordinarily**, in a criminal case is whether prosecution has proved its case or not and not whether the accused failed to prove his case or not. In a prosecution under Section 138 of the Act also,

burden of proof is on the prosecution. In proving the offence, a presumption is also available in favour of the holder in respect of a particular fact which is specified therein, provided, the basis for drawing the presumption is established. But that does not mean that in a prosecution under Section 138, the burden is upon the accused to prove his case.

10. In any criminal case, the first and foremost question to be considered is whether the prosecution has discharged its primary burden to establish all the ingredients of the offence. The court shall not enter a finding that the accused failed to prove his case and hence the prosecution case stands proved, as done in this case. The courts below adopted a peculiar and strange course to convict the accused in this case. Both the courts below found that the relevant cheque was issued as a security for the loan availed of by his father to the tune of Rs.50,000/- is true. Learned Sessions Judge held, "therefore I find that Exhibit P1 cheque was issued for the loan of Rs.50,000/- availed of by the father of the accused" (vide paragraph 7 of the judgment).

11. It is interesting to note that learned Sessions Judge even placed reliance upon ***ICDS Ltd vs. Beena Shabeer*** **(2002 (3) KLT 118)** and also ***Sanal kumar and others vs. Rajeev kumar*** **(2004(1) KLJ 172)** to hold that the "prosecution will lie even if the cheque is issued by the drawer in discharge of the liability of another".

These decisions were cited by learned counsel appearing for complainant-respondent before the lower appellate court. It is clear from all these facts that the argument advanced before the lower court on behalf of the complainant was contrary to his own case.

12. The prosecution case is that the accused himself borrowed a sum of Rs.1,25,000/- from complainant and he issued the cheque Exhibit P1 for the discharge of the said debt. The complainant has no case that the accused's father borrowed any amount from complainant and that Exhibit P1 cheque was issued by accused to discharge such debt. Therefore, the finding that the cheque was issued by the accused to discharge liability of his father, cuts the very root of the prosecution case. When the defence case which is contrary to the prosecution case on material aspects is accepted, the prosecution case automatically falls to ground.

13. Having found that the accused's case is acceptable at least in part, regarding the purpose for which Exhibit P1 was issued, the court below also should have found that it destroys the whole worth of the prosecution case. The normal consequence which ought to follow is, to hold that the prosecution case is belied by the defence case and hence the accused is entitled for an acquittal. Learned defence counsel also lost sight of this important fact and he argued vehemently that the findings of the court below may be reversed. A material part

of the defence plea is found to be acceptable and there is no reason why the defence wants such findings be reversed.

14. Having accepted the defence version that the cheque was given for the discharge of the liability of his father as against a debt of Rs.50,000/-, the prosecution case (that Rs.1,25,000/- was borrowed by the accused from the complainant) stands disproved. The complainant's case that the cheque was handed over for the discharge of the debt incurred by the accused himself in favour of complainant to the tune of Rs.1,25,000/- is belied thereby. But, the court below, instead of holding that prosecution case is disproved by the accused, it entered a finding that the accused is guilty of the offence under Section 138. According to the lower courts, accused is answerable for the offence, even if he issues a cheque to discharge the debt of another, following the decisions of the Supreme Court. Those decisions are not applicable to the facts of this case, since the complainant himself has no case that the cheque issued by accused was to discharge debt of his father. The accused will not be answerable for any allegation which was not made by the complainant, but which either the lawyers or the court invented on behalf of him.

Summing up my discussion, the finding that Exhibit P1 is the cheque drawn for the discharge of a debt of the father of accused is contrary to the complainant's case. The definite case put forward by

the complainant that the accused himself borrowed Rs.1,25,000/- and the cheque was issued for the discharge of such debt etc. is not proved. This is a case wherein, even on the basis of the findings of the courts below themselves, the conviction entered against the accused is unsustainable. Prosecution failed to establish its case and therefore accused is entitled for an acquittal. The accused is therefore, found not guilty of offence under Section 138 of the Act and he is acquitted of the said offence. He is set at liberty forthwith.

This revision petition is allowed.

K. HEMA, JUDGE.

smp